

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ENCINO MOTORCARS, LLC,                     )  
  Petitioner,                     )  
  v.                                     ) No. 16-1362  
HECTOR NAVARRO, ET AL.,                    )  
  Respondents.                    )  
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Pages: 1 through 64

Place: Washington, D.C.

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ENCINO MOTORCARS, LLC, )  
 Petitioner, )  
 v. ) No. 16-1362  
 HECTOR NAVARRO, ET AL., )  
 Respondents. )

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Washington, D.C.

Wednesday, January 17, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

PAUL D. CLEMENT, Washington, D.C.; on behalf of the Petitioner

JAMES A. FELDMAN, Washington, D.C.; on behalf of the Respondents

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument first this morning in Case 16-1362,  
5 Encino Motorcars versus Navarro.

6 Mr. Clement.

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Mr. Chief Justice, and  
10 may it please the Court:

11 Service advisors are salespeople  
12 primarily engaged in servicing automobiles.  
13 Service advisors are plainly salespeople, and  
14 what they sell and what they are primarily  
15 engaged in is the servicing of automobiles.

16 Thus, Respondents and the nation's  
17 100,000 service advisors come within the  
18 literal disjunctive text of the FLSA exemption  
19 for any salesman, partsman, or mechanic  
20 primarily engaged in selling or servicing  
21 automobiles, trucks, or farm implements.

22 That is --

23 JUSTICE GINSBURG: Is -- is there any  
24 other category that -- the statute lists three  
25 categories: Salesmen, partsmen, and mechanics.

1           And you say the service advisor is --  
2           should fit under salesmen. Is there any other  
3           person that's not specifically enumerated  
4           that's subsumed under one of these categories?

5           MR. CLEMENT: There -- there is,  
6           Justice Ginsburg, if what you mean is sort of  
7           an occupation that was well understood at the  
8           time that Congress passed this exemption in  
9           1966. The example would be automobile body  
10          repairmen. It was treated as a separate  
11          category, for example, in the Occupational  
12          Outlook Handbook that my friends on the other  
13          side like so much, but yet the -- the Labor  
14          Department has consistently treated repairmen  
15          in the body shop as covered by the exemption,  
16          just like mechanics in the service shop.

17          So I think that goes a long way to  
18          showing that it's not like Congress was  
19          consulting this handbook at all or had this  
20          conception that it was going with a  
21          three-to-three correspondence with existing  
22          occupations and what it was trying to capture  
23          in the statute.

24          JUSTICE KAGAN: Mr. Clement --

25          JUSTICE SOTOMAYOR: How about --

1 JUSTICE KAGAN: -- you said the  
2 literal meaning. And you have some good  
3 arguments, but I have to tell you I don't think  
4 that that's the best one of them.

5 Just if you think of what servicing  
6 means -- this is one dictionary, but basically  
7 all dictionaries say the same thing -- it means  
8 to perform services of maintenance, supply,  
9 repair, installation as to service a car.

10 So it actually means to do the work,  
11 to do the repair, to do the maintenance -- I  
12 think would be the most ordinary understanding  
13 of what servicing means.

14 So it does seem as though, for all the  
15 arguments that you do have, that one cuts  
16 against you, that, you know, just the ordinary  
17 meaning of what it means to be engaged in  
18 servicing automobiles is to be repairing,  
19 maintaining, fixing cars.

20 MR. CLEMENT: Well, Your Honor, I  
21 mean, I'd love to talk to you about some of the  
22 other arguments you seem to like better, but  
23 let me try to push back a little bit on this  
24 one, which is I'm the -- the first to admit  
25 that servicing in some statutes can have a

1 relatively narrow compass and includes only,  
2 you know, essentially turning the wrenches  
3 yourself.

4 But in other contexts, it can have a  
5 broader meaning, supplying the service,  
6 providing the service. And here we know that  
7 Congress used the term in that latter, broader  
8 sense, because of the inclusion of partsmen,  
9 because partsmen are not engaged in getting  
10 under the hood and turning the wrenches.

11 The best place to look at what a  
12 partsman does is the Labor Department  
13 regulation that's been on the books since 1970.  
14 It specifically talks about what a partsman is  
15 primarily engaged in, and that is the  
16 requisitioning, stocking, and dispensing of  
17 parts.

18 JUSTICE KAGAN: So I -- that is one of  
19 the better arguments, I think, is what -- what  
20 "partsman" is doing in this, but I think I'm  
21 still suggesting, before we get on to that,  
22 that if you took partsman out of this statute,  
23 I don't really think that you'd have a leg to  
24 stand on here, that we would just naturally  
25 mean, well, servicing automobiles is like

1 fixing them.

2 And what -- and the service providers,  
3 they have something to do with servicing, to be  
4 sure, but they're not doing the servicing.  
5 What they're doing is selling service products.

6 MR. CLEMENT: Well, Your Honor, I  
7 think if "partsman" were not in the statute, I  
8 would have a weaker argument. I think I still  
9 might have a leg to stand on, especially if  
10 there were four decades of industry reliance on  
11 a position.

12 But I do think that the partsman can't  
13 be ignored and I do think it's actually a  
14 mistake to sort of look at servicing in  
15 isolation from the inclusion of partsmen in the  
16 statute because --

17 JUSTICE GINSBURG: But if we look --  
18 if we look, Mr. Clement, at how partsmen got in  
19 there, I mean, there is the legislative history  
20 that Senator Bayh said the partsmen are woken  
21 up at 4 in the morning because some piece of  
22 farm equipment needs to be repaired. And then  
23 there was somebody else who backed that up. So  
24 those senators at least thought of the partsman  
25 as somebody who would work irregular hours.



1           Now, they may not have -- they may  
2           have been talking about a specific category of  
3           partsmen, the ones -- ones who attend to farm  
4           equipment, but they use -- the statute uses the  
5           general title.

6           MR. CLEMENT: Well, it does more than  
7           use the general title, Justice Ginsburg. It  
8           also -- I think there's no argument that the  
9           statute only covers farm implement partsmen.

10           Based on its disjunctive structure, it  
11           certainly covers, I think, automobile partsmen  
12           and partsmen at a truck dealership. And I  
13           think equally importantly, it covers it without  
14           regard to whether they work outside or have  
15           unusual hours.

16           And so I think what you have here is a  
17           classic example of where Congress was impelled  
18           to include partsmen in the statute based on  
19           some very specific concerns of specific  
20           senators about farm dealer partsmen, but then  
21           they expanded the statute quite a bit more  
22           substantially to cover all of the partsmen.

23           One other just footnote on that piece  
24           of the legislative action, I think it's  
25           actually interesting that when Congress first

1 proposed adding partsmen, they proposed adding  
2 partsmen who were selling or servicing farm  
3 implements.

4 And so I think what that shows is that  
5 Congress may have actually had with selling or  
6 servicing not necessarily two siloed,  
7 disjunctive terms but sort of the broader  
8 process of selling or servicing, because I  
9 don't think partsmen ever sold the farm  
10 implements themselves.

11 JUSTICE KAGAN: One of the amicus  
12 briefs talks about what partsmen did  
13 historically and makes the case that what  
14 partsmen did when this statute was passed is a  
15 little bit different from what -- or a lot  
16 different from what a partsman does now, in the  
17 sense that when this statute was passed, there  
18 were not readily available, ready-made,  
19 off-the-shelf parts. And what partsmen really  
20 did was kind of get under the hood and try to  
21 strip engines and play with the parts and  
22 adjust parts. And, you know, it was very much  
23 more part of the repair process than somebody  
24 who was taking things off the shelf.

25 MR. CLEMENT: Justice Kagan, I know

1     there's an amicus brief that says that. I  
2     think -- you know, we're here to ask you to  
3     mostly look at the plain text of the statute,  
4     but if you're interested in looking at  
5     something, I do think that occupational  
6     handbook from 1966 has a couple of pages about  
7     what partsmen did back then, and I don't think  
8     it really maps up with what the -- the amicus  
9     brief says, which is to say, even back in 1966,  
10    sure, there might be an occasion on which they  
11    had to fix some part or got under the hood, but  
12    in the main, what they did then is exactly what  
13    the Labor Department identified, which is  
14    they're behind the counter, they're making sure  
15    that when you do a repair and you need a new  
16    spark plug or a new fan belt, that they  
17    actually have it in stock.

18           And that is, I think, classically what  
19    a partsman does. I don't think that it really  
20    puts them really in the same place as the  
21    mechanics. I mean, it's interesting, if you  
22    want to look at those photos at the back of the  
23    red brief that come from that occupational  
24    handbook, I think it's telling that the service  
25    advisor and the mechanic are the two photos

1 where the hood's up. The -- the counterman,  
2 the partsman, he's behind the counter, which,  
3 you know, I don't mean to say that's where he  
4 or she belongs, but that is where they  
5 typically are, and it's pretty far removed from  
6 the action, which is why I think the partsmen  
7 really are the clue to interpreting this  
8 statute to have this broader compass of  
9 services.

10 JUSTICE KAGAN: So can I try a  
11 hypothetical on you? And the hypothetical  
12 statute is designed to match this one in  
13 structure and -- and -- and to present the same  
14 question. So here's the language: Any  
15 salesman, designer, or seamstress primarily  
16 engaged in selling or making dresses. All  
17 right?

18 So there we -- we know the seamstress  
19 is involved in making dresses. We know the  
20 salesman is involved in selling dresses. The  
21 designer is the partsman. And you could say,  
22 look, the designers, they're not actually  
23 sitting there with the needle, but they're  
24 still sort of making the dresses. That's the  
25 partsman.

1           And then the question is, would you  
2 really say that the salesman is making the  
3 dresses too?

4           MR. CLEMENT: I'm not sure I would,  
5 Your Honor, but I think there are reasons for  
6 that, which is I think making dresses is a  
7 narrower term, frankly, than servicing. I  
8 think servicing is a broader term.

9           I also think that designers are,  
10 frankly, more integral to the making of the  
11 dresses than the partsman is to any kind of  
12 narrow concession of services --

13           JUSTICE BREYER: That is exactly why  
14 I've -- I was interested. You say you're  
15 primarily relying on literally.

16           Well, I think in 10 minutes the two of  
17 us could think of hundreds of examples maybe,  
18 or at least 50, where just, look, any  
19 seamstress or customer who makes or wears  
20 dresses.

21           Hey, they don't mean the seamstress  
22 who wears dresses. They mean the customer who  
23 wears dresses and the seamstress makes the  
24 dresses. Any professor or student who teaches  
25 or learns at this university, they don't mean

1 the professor who learns at the university.  
2 They mean the professor who teaches and the  
3 student who learns.

4 Any salesman who -- what's the word,  
5 you know, sells or -- sells cars or -- we --  
6 you see the -- but I think there's so many  
7 examples like that, that that seems to be the  
8 natural meaning. You have two words over here  
9 that are verbs, two words over here that are  
10 nouns. The first seems to go with the first,  
11 the second with the second.

12 And if I just gave you this and you  
13 knew nothing else about it and you were just  
14 looking at the literal words, I would have  
15 thought on a bet you would have said that's the  
16 interpretation.

17 MR. CLEMENT: Well, Justice Breyer,  
18 there's a couple of things. Most of the  
19 examples that you are suggesting, I think, have  
20 a two-to-two correspondence --

21 JUSTICE BREYER: Yeah.

22 MR. CLEMENT: -- not a three-to-two  
23 correspondence. And I do think that makes a  
24 big difference in the real world.

25 The second thing is I do think, I

1 mean, I'm not here to tell you that there  
2 aren't disjunctive series followed by  
3 disjunctive series where you do have matching.

4 JUSTICE BREYER: Yeah.

5 MR. CLEMENT: Now, I think often  
6 that's because the matching really excludes the  
7 other cases or produces a null set. I think it  
8 also depends a little bit on sort of what's  
9 going on.

10 With your professor and student  
11 hypothetical, if you do -- you know, if that  
12 was all tethered to a requirement as to who  
13 gets issued a library card, if you had a  
14 professor who was sort of visiting that  
15 semester and only learning and not teaching,  
16 would they really deny him a library card?

17 JUSTICE BREYER: No, no. Okay.

18 JUSTICE KAGAN: But, Mr. Clement --

19 JUSTICE BREYER: But then you go to  
20 her second point, which the second point was  
21 what about the purposes as Congress reveals  
22 them?

23 JUSTICE KAGAN: Could we --

24 JUSTICE BREYER: You can see in -- in  
25 the -- sorry?

1 JUSTICE KAGAN: Could I ask your  
2 indulgence --

3 JUSTICE BREYER: Yeah.

4 JUSTICE KAGAN: -- just before you  
5 talk about purposes?

6 Just, you know, my -- what my  
7 hypothetical was designed to do, and I came up  
8 with a bunch of them and I'll spare you --

9 (Laughter.)

10 MR. CLEMENT: Thank you.

11 JUSTICE KAGAN: -- is to have a  
12 three-to-two correspondence. Your answer back  
13 to Justice Breyer was right away: Well, your  
14 hypotheticals have a two-to-two correspondence  
15 and that's different.

16 My hypothetical had a three-to-two  
17 correspondence and you had to do a little bit  
18 of stretching to get one of the -- the middle  
19 term in.

20 But the question is does that force  
21 you to stress -- to stretch so much that you  
22 get the first term in, when the first term  
23 pretty naturally pairs with the other, with the  
24 -- with the selling word, and that's what  
25 you're asking us to do.



1           And I think to put the point more  
2 generally, the fact that you have to do a  
3 little bit of stretching to get partsmen in  
4 does not compel you to do a lot of stretching  
5 to get salesmen in.

6           MR. CLEMENT: But, Justice Kagan, and  
7 I -- I want to try to get back to the purpose  
8 of questions, but I do think that the degree of  
9 stretching you have to do to get partsmen in is  
10 not a significant difference between how much  
11 stretching you have to do to get the service  
12 advisors in.

13           And I think that's really the key. I  
14 mean, maybe in your hypothetical, which you  
15 designed a lot of them and you probably gave me  
16 one of the best ones, and I think that's  
17 because --

18           JUSTICE KAGAN: Now you're daring me.  
19           (Laughter.)

20           MR. CLEMENT: Well, no, no, but -- but  
21 -- but I take it that because you really  
22 thought there was a big gap between the  
23 designers and the salespeople in terms of the  
24 stretching. And I just don't think that's the  
25 case with the partsmen. And I really do think

1 -- I mean, the partsmen, I mean, God love the  
2 partsmen, but they're pretty far removed from  
3 the action of turning the wrenches.

4 I actually think that if you did an  
5 empirical test as to who got under the hood  
6 more often, the service advisors would win.

7 JUSTICE GORSUCH: Mr. Clement, one --

8 JUSTICE GINSBURG: Well, why can't you  
9 say that this -- the partsmen, they're exempt  
10 because Congress put them there specifically  
11 and you don't have to match them with anything.  
12 Congress may have been overbroad because they  
13 started with the farm equipment people.

14 So, if we just look at the two others,  
15 why should we stretch service advisor to come  
16 within the mechanic who's actually servicing  
17 when we know that the service advisor doesn't  
18 even possess the skills to be engaged in  
19 servicing?

20 MR. CLEMENT: So, Justice Ginsburg, I  
21 don't -- I don't think the service advisor is  
22 differently situated from the partsman in terms  
23 of having the skills to go under the hood and  
24 turn the wrenches himself or herself.

25 I think, as to the answer to your

1 question about why don't we just say, hey, the  
2 partsmen are in because the partsmen are in,  
3 because the structure of the statute doesn't  
4 let you say just the partsmen are in. The  
5 partsmen are in because they are primarily  
6 engaged in selling or servicing automobiles.

7 Now, I take it that the partsmen don't  
8 sell the automobiles, so they must be in either  
9 because selling or servicing is just sort of a  
10 catch-all that gets everything that the  
11 dealership basically does, or it's because we  
12 have a broad enough conception of servicing to  
13 include the partsmen.

14 Now, the way that I understand this  
15 Court to interpret statutes is, once you  
16 interpret a statutory term to have a certain  
17 breadth, I mean, that's what it has, even in  
18 like Clark v. Martinez, even when you have to  
19 stretch the language of the Constitution to  
20 avoid a -- of a statute to avoid a  
21 constitutional problem --

22 JUSTICE KENNEDY: Do you have an  
23 example of a partsman that is not engaged in  
24 servicing automobiles, say a partsman in  
25 another office and he -- downtown from the

1 dealership, and he just picks up the phone and  
2 orders parts or something?

3 MR. CLEMENT: Sure. I mean, first of  
4 all, you could have a partsman who's not  
5 employed by an automobile dealership at all,  
6 that they're just an independent partsman or  
7 they work at AutoZone or something like that.  
8 I don't think they're covered by the terms of  
9 the statute.

10 So I do think you have to interpret  
11 the statute so you tether partsman to a term  
12 like servicing. And then, once you interpret  
13 it to have a certain breadth, I don't think it  
14 can shrink back down so it can be wide as to  
15 partsmen but narrow as to service advisors.

16 And so I do think then the service  
17 advisors do come comfortably within the text of  
18 the statute, and we haven't talked about the  
19 fact that for four decades they've been treated  
20 that way, which I think --

21 JUSTICE KENNEDY: Well, I -- I wanted  
22 to ask you, you mentioned in your argument that  
23 there's been decades of reliance.

24 If we want to adopt that argument and  
25 say, well, there's been reliance here, it's a

1 close question, we're not sure, it's ambiguous,  
2 what case do I cite to show that reliance bears  
3 on the interpretation of the statute?

4 MR. CLEMENT: I think you'd cite --  
5 among other things, you could cite the  
6 Christopher case, the Christopher against  
7 SmithKline case, which is another FLSA case.  
8 And this Court averted to the reliance interest  
9 both in deciding not to apply our deference but  
10 also in interpreting the statute.

11 And I think the principle isn't, you  
12 know, well, if for four decades people have got  
13 it wrong, we'll get it wrong.

14 I -- I think the principle is, you  
15 know, as -- as the -- as the Seventh Circuit  
16 said in the Yi case, which Christopher cited, I  
17 mean, it's -- it's no mean feat to conclude  
18 that an agency has been in open, notorious  
19 violation of the FLSA for four decades.

20 And I think the behavior of the  
21 industry is some evidence of what those terms  
22 meant.

23 JUSTICE GINSBURG: The agency, as I  
24 understand it, the agency gave up after two  
25 circuits rejected its position. So the agency

1 acquiesced in the Fourth and Fifth Circuit  
2 position.

3 But last time around, I noticed your  
4 argument about the massive retroactive  
5 liability. And I said, well, what about this  
6 provision that says someone who relies in good  
7 faith on the agency position doesn't have  
8 retroactive liability?

9 MR. CLEMENT: Well, it's -- I think  
10 that the issue, I'm happy to discuss that,  
11 that's the Portal-to-Portal-Act affirmative  
12 defense, I think our reliance on that is even  
13 more complicated now because it doesn't just  
14 allow for no damages when you've relied on the  
15 agency in the abstract. It specifically talks  
16 about relying on agency regulations.

17 So at least since 2011, when you had  
18 the last change in administrative position, I  
19 don't think we'd be able to rely on the  
20 Portal-to-Portal Act affirmative defense to say  
21 we're not subject to liability.

22 The other thing my friends on the  
23 other side say is that, well, you know, there's  
24 this other exemption, 207(i), that will help at  
25 least those that were paid on a majority basis

1 for a commission.

2 Now, there's a couple of things about  
3 that. I mean, I think the most important one  
4 is there -- there -- there -- I don't know the  
5 exact number, but there are a sizable number of  
6 people in the industry who are paid majority  
7 salary, and so they'd have to be restructured.

8 But the other thing is it's a little  
9 bit rich for my friends on the other side to  
10 say: Don't worry about this because of 7(i).  
11 I mean, when they filed this complaint, they  
12 must have had some theory as to why we weren't  
13 already covered by 7(i).

14 So I think that just shows that what  
15 -- what the industry has relied on for four  
16 decades is not some combination of the  
17 Portal-to-Portal Act in 207(i). What the  
18 agency -- what the industry's relied on is the  
19 idea that in this context, you know, it is this  
20 exemption that exempts all service advisors,  
21 not just those that are paid primarily on a  
22 commission.

23 JUSTICE KAGAN: When I think of these  
24 three categories of workers, so service  
25 providers, partsmen, mechanics, to coin a

1 couple of silly kind of words, a service  
2 advisor is customer-facing. You know, it's --  
3 the -- the primary -- the primary job is to  
4 deal with customers, to sell them things, to  
5 liaison with them, to make sure they're happy.

6 Mechanics and also partsmen are  
7 car-facing. You know, their job is to do stuff  
8 with the car. And, you know, in different  
9 ways, the partsman is more helping, but their  
10 -- their focus is on the automobile, whereas  
11 the service provider's focus is on the  
12 customer.

13 That seems to me a pretty big divide,  
14 suggesting that the service providers are  
15 really, you know, salesmen, not servicers.

16 MR. CLEMENT: Well, Your Honor, a  
17 couple of things.

18 First of all, you probably anticipate  
19 that I'm going to take you back to the partsmen  
20 again because I do think describing the  
21 partsmen as just vehicle-facing really  
22 mis-describes what they do. And I would ask  
23 you, if you have the time, to look at that 1966  
24 entrance on the auto partsman counterman,  
25 because what it talks about is, you know, they



1 really -- sometimes they sell direct parts to  
2 retail customers. So sometimes they too are  
3 customer-facing.

4           And that's all part of what they are  
5 primarily engaged in, which is not just facing  
6 the car. It's really -- their responsibility  
7 is the parts, whether it's the mechanic that  
8 wants the parts for a particular repair or  
9 whether it's some outside customer who wants to  
10 buy a part because they're a do-it-yourselfer.  
11 Now -- so I really think the partsmen are in  
12 the middle in a way that does really give  
13 servicing a broad compass.

14           The other thing I would say is I don't  
15 think you can underestimate the degree to which  
16 these three occupations, especially in light of  
17 the way the industry has structured itself for  
18 the last four decades, really do go together.  
19 There are many dealerships, as I understand it,  
20 who -- essentially, the commission is a pot  
21 that is shared by the service advisors, the  
22 partsmen, and by the mechanics that all work at  
23 some dealerships. They all get paid on a  
24 commission, and it all comes out of the same  
25 pot, which, of course, gets to the common sense

1 of the matter, which is, if the service  
2 advisors don't do their job, there's not much  
3 of a job for the partsmen or the mechanics to  
4 do. There's no -- there's no work to do if the  
5 service advisors --

6 JUSTICE KAGAN: Is -- is everybody  
7 who's in a service department -- does everybody  
8 count as primarily engaged in servicing  
9 automobiles who's in a service department, the  
10 receptionist, the filers?

11 MR. CLEMENT: The answer is I'm not  
12 sure. I think probably not. But I also don't  
13 think it matters much because, of course, to be  
14 exempt, you not only have to be primarily  
15 engaged in servicing, you also have to be a  
16 salesperson, a partsman, or a mechanic.

17 So if you take somebody like a car --  
18 a car porter, you know, are they primarily  
19 engaged in servicing? I think the definition  
20 of partsman is probably broad enough to say  
21 yes. You might disagree with me. But, either  
22 way, they're not exempt.

23 JUSTICE KENNEDY: What about an  
24 automobile upholsterer?

25 MR. CLEMENT: Again, I would say that

1 that's somebody who might be primarily engaged  
2 in servicing, but they wouldn't be covered  
3 because they're not a mechanic, they're not a  
4 partsman, and they're not a salesperson.

5 JUSTICE KAGAN: How about if the  
6 service advisor --

7 JUSTICE GORSUCH: What -- what role do  
8 -- what role do the -- the three objects at the  
9 end of the sentence play in your  
10 interpretation? We haven't discussed those  
11 yet.

12 MR. CLEMENT: Well, I hope they play  
13 this role, Your Honor, which is I think it's  
14 common ground among -- between the parties that  
15 those are distributed to each other noun/gerund  
16 combination. So nobody's here saying, well,  
17 the first goes with the first when it comes to  
18 the object, so the only people that are exempt  
19 are the farm dealer mechanics.

20 And I think that just shows -- I mean,  
21 it would be really odd -- anything is possible,  
22 of course, but it would be really odd if the  
23 way you read the statute is with -- the nouns  
24 vis-a-vis the gerunds, you apply this reddendo  
25 principle, but with respect to the gerunds

1 vis-a-vis the objects, you apply the normal  
2 "or" means "or" principle.

3 I think the real way to apply this  
4 statute -- and, honestly, I think what is the  
5 only thing that really ought to be left of the  
6 reddendo canon is the commonsense principle  
7 that when you have these disjunctive series, if  
8 they combine in a way that really is something  
9 like the null set, you ignore it. You don't  
10 lose a lot of sleep over it, and it's fine  
11 because, you know, I'm not here to tell you  
12 there are mechanics who are primarily engaged  
13 in selling automobiles.

14 But since there aren't any, you don't  
15 really have to lose any sleep over it, and you  
16 shouldn't construe the statute primarily based  
17 on the fact that there's a null set with one  
18 combination, especially when there's 100,000  
19 flesh-and-blood examples of salesmen who are  
20 primarily engaged in servicing.

21 JUSTICE GORSUCH: What about our  
22 narrow construction canon?

23 MR. CLEMENT: Well, that's an  
24 interesting question, Your Honor. I mean, you  
25 know, the Ninth Circuit applied that, and I

1     suppose that, you know, the Ninth -- the canon  
2     that the Ninth Circuit applied and the one it  
3     derived from one of this Court -- Court's older  
4     cases talks about being plainly and  
5     unmistakably within the exemption.

6             Now, I'm a big enough believer in my  
7     argument here that I think maybe we even meet  
8     the plain and unmistakable test, but I also  
9     think, as we've urged the Court, that it may be  
10    time to put that canon to rest.

11            And I'm not suggesting that the FLSA  
12    should be interpreted differently from any  
13    other statute. It's a general principle of  
14    statutory construction that exemptions are not  
15    construed to swallow the rule.

16            I think that's a perfectly sensible  
17    rule of construction. But I do think to sort  
18    of amp that up to the degree that it is -- has  
19    to be plain and unmistakable to come within the  
20    exemption really is contrary to the way this  
21    Court generally interprets statutes.

22            I don't think it makes a lot of sense,  
23    especially if you remember that a lot of these  
24    exemptions are being passed much later in  
25    history than the 1938 enactment of the FLSA.

1           So even if you accept the proposition  
2           that, in 1938, Congress had an unalloyed  
3           interest in being remedial in the FLSA, I don't  
4           know why that would inform your interpretation  
5           of an exemption enacted in 1966 for the express  
6           purpose of at least having some employees not  
7           covered by the FLSA.

8           And I do think that this would be an  
9           odd statute to have this plain and unmistakable  
10          test when it's riddled with exemptions. So, if  
11          there were ever one statute where you'd say,  
12          okay, Congress, yeah, it had a very important  
13          purpose, it was a worthy purpose, but it didn't  
14          pursue it at all costs, it would be this  
15          statute.

16          If you look at 213, which has the  
17          various exemptions to both the minimum wage  
18          laws and the overtime laws, as I count it up,  
19          there are 31 exemptions to the -- to the -- to  
20          the minimum wage and overtime laws just in 213,  
21          and there are other exemptions in other places  
22          in the statute. So what an odd statute to say  
23          that the way we're going to interpret this is  
24          only with a thumb on the scale in favor of the  
25          coverage and against the exemptions.

1           If there are no further questions, I'd  
2 reserve my time.

3           CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5           Mr. Feldman.

6           ORAL ARGUMENT OF JAMES A. FELDMAN

7           ON BEHALF OF THE RESPONDENTS

8           MR. FELDMAN: Mr. Chief Justice, and  
9 may it please the Court:

10           The exemption in this case is for any  
11 salesman, partsman, or mechanic primarily  
12 engaged in selling or servicing automobiles.  
13 The most obvious reason why or the clearest  
14 reason why service advisors don't come within  
15 that exemption is they don't service  
16 automobiles.

17           In our brief, we cite five -- I think  
18 the five most authoritative dictionaries of the  
19 English language, and they define "service" --  
20 "to service" as to maintain or repair. You  
21 maintain -- you don't maintain or repair a car,  
22 in the way people would ordinarily speak, with  
23 a pad or a clipboard and a pencil or a  
24 telephone, which are the primary tools that  
25 service advisors use.

1           You do it back in the back of the shop  
2 when you're actually working on the car.  
3 Service advisors don't do that, and, therefore,  
4 they -- they don't service cars. They don't  
5 repair or maintain them.

6           CHIEF JUSTICE ROBERTS: Well, I guess  
7 sometimes, though, I mean, they do look under  
8 the hood sometimes, right? You bring the car  
9 up, you know, it's making this noise, they go  
10 out and at least listen to the noise, and  
11 sometimes they can say right away: Oh, that's  
12 probably this. And then they send something  
13 down, and whether the customer is still there  
14 or comes back later, all that they do in the --  
15 the mechanics or the partsmen, send it up and  
16 then plug it in and it's right.

17           So, I mean, in certain situations, the  
18 advisor would play the primary role in fixing  
19 the problem, not when it's more complex, maybe  
20 not typically, but certainly in what I suppose  
21 would be many occasions.

22           MR. FELDMAN: I -- I don't think so.  
23 I mean, actually, I think what the advisor does  
24 is make a guess, but really -- of what might be  
25 wrong based on what the customer says. I mean,



1 sometimes the customer goes in and says: I  
2 want a 20,000-mile check -- servicing. And the  
3 service advisor just sends it back and says we  
4 need a 20-mile -- 20,000-mile servicing. Now,  
5 maybe the mechanic --

6 CHIEF JUSTICE ROBERTS: That's a  
7 different -- that's a different example.

8 MR. FELDMAN: -- finds something. But  
9 even --

10 CHIEF JUSTICE ROBERTS: Sometimes -- I  
11 -- I guess what I'm saying, sometimes the  
12 primary decision in servicing the car is going  
13 to be made by the service advisor, at least the  
14 initial thing. You know, send something down.

15 The -- the mechanic may well look at  
16 it himself or herself, but the service advisor  
17 says it's a distributor cap or whatever, and it  
18 turns out it is, they put it on, and it's done.

19 MR. FELDMAN: Yeah, I -- I think  
20 actually the service advisor's job -- they may  
21 make a guess as to what's wrong and give the  
22 customer -- say, well, it might be the  
23 distributor cap. But it's up to the mechanic  
24 to actually figure out what's wrong, not the  
25 service advisor.

1 JUSTICE KENNEDY: Suppose the service  
2 advisor meets the customer in the morning and  
3 he said: I'm a service advisor. I'm here to  
4 supervise and to plan the servicing of your  
5 automobile. Is that correct for him to say?

6 MR. FELDMAN: I -- well, actually, I  
7 don't think so. I don't think they supervise  
8 the servicing of the automobile. I think they  
9 serve a communications function. They don't in  
10 any sense supervise the mechanic.

11 JUSTICE KENNEDY: Well, how about to  
12 arrange for?

13 MR. FELDMAN: Yes, I think it is  
14 correct to say they arrange for it. But I  
15 think there -- there's a huge difference  
16 between --

17 JUSTICE KENNEDY: But if -- if that's  
18 true, it seems to me he's engaged in servicing  
19 the automobile.

20 MR. FELDMAN: No, I don't think so  
21 because I -- I think there's a huge difference,  
22 as a matter of -- he's definitely not servicing  
23 the automobile just because he's arranging for  
24 it. There's many people who arrange for the  
25 provision of services but don't perform the

1 service themselves.

2 If somebody is -- I will take the  
3 example of some salesmen. This is particularly  
4 true of the difference between sales and  
5 service, which are pretty much two distinct  
6 categories. If somebody's going door to door  
7 and selling house painting services, says, you  
8 know, do you want your house painted, that  
9 person is selling and maybe arranging for  
10 painting the house, but they are not painting  
11 the house. If somebody's at a --

12 JUSTICE KENNEDY: But if they -- but  
13 if they picked out the color and -- and -- and  
14 advised all about the quality of the paint,  
15 paint to use, and different costs, and  
16 scheduled the timing and so forth, I think they  
17 could be -- they could be supervising the  
18 painting of the house.

19 MR. FELDMAN: Well, I mean, actually  
20 supervising service, supervising a repair also  
21 isn't the same thing as repairing. But I do  
22 think that it's quite clear, and you can look  
23 at the machinist's brief, these people in no  
24 sense supervise the mechanics. They tell the  
25 mechanics what the problem is and what the

1 customer wants and it's primarily to serve as a  
2 communication link. It's up to the mechanic or  
3 whoever else is working on it in the back to  
4 figure out what to do.

5 CHIEF JUSTICE ROBERTS: Well, but, I  
6 mean, just in -- and maybe this isn't the best  
7 guide to the interpretation, but it's sort of  
8 common understanding if you over several years  
9 dropped your car off whenever you're supposed  
10 to or whenever it's broken and -- and you talk  
11 to Fred about getting it fixed, and -- and  
12 somebody comes to you later and says something  
13 -- I've got a problem with my car, you would  
14 say my service guy is Fred, go see him.

15 It's just sort of your general  
16 reaction is that is part of the service -- not  
17 only that, it's the part, the only part that  
18 you have experience with. But you would think  
19 of Fred as the person who services your car,  
20 no?

21 MR. FELDMAN: I -- I -- I -- I would  
22 just respectfully disagree. I actually think  
23 --

24 CHIEF JUSTICE ROBERTS: It's  
25 different, go to different shops, I guess?

1           MR. FELDMAN: I -- I think you would  
2 -- I think you would think of Fred as the  
3 person you would give the car to. The person  
4 to service is to maintain a repair, and the  
5 person in the back who actually works on the  
6 car is the person who services the car.

7           JUSTICE BREYER: You can read it that  
8 way. I have no doubt that might even be the  
9 most natural reading. Suppose the word were  
10 "involved in" instead of "engaged in."

11          MR. FELDMAN: "Involved in" would  
12 bring it much closer and actually --

13          JUSTICE BREYER: Yeah, it would. And  
14 so what we're doing is we're trying to parse  
15 the difference between "engaged in" and  
16 "involved in" in a fairly technical statute  
17 involving one of 40,000 different kinds of  
18 workers as part of a very general statute.

19          Now, that to me rings a bell that if  
20 this isn't a question for an agency, what is?

21          Now, all right. So, if I'm thinking  
22 that, maybe no one else is, I'm only speaking  
23 for myself, I was sort of surprised that nobody  
24 in the Ninth Circuit referred to a doctrine  
25 that nobody refers to anymore. It's called

1 primary jurisdiction. And it can be used to  
2 ask the relevant department to file a brief,  
3 and nobody did that.

4 MR. FELDMAN: No.

5 JUSTICE BREYER: Now, suppose I --  
6 suppose -- suppose I -- I think, gee, I don't  
7 know the answer to this question. It's highly  
8 technical. I do look to purpose. The purpose,  
9 apparently, was that they put these mechanics  
10 in there because they had farm equipment  
11 somewhere, that people go in the middle of the  
12 night, so they didn't have fixed hours.  
13 Whether that was so or not, I don't know.

14 And maybe the service person would  
15 call at 2 in the morning and tell the farmer  
16 he's coming, in which case he doesn't have  
17 fixed hours, so he should be exempt too.

18 I don't know. So suppose I start --  
19 you see the attitude? Have you any advice for  
20 me at all?

21 MR. FELDMAN: Yeah, I do.

22 (Laughter.)

23 MR. FELDMAN: In the first place, if  
24 you look at the -- if you look at the car  
25 dealership, it's not the case that there are

1 three main people in the car dealership: The  
2 salesmen, the partsmen, and the mechanics.

3 JUSTICE BREYER: Uh-huh, uh-huh.

4 MR. FELDMAN: There's salesmen who  
5 sell financing, insurance, and warranties.  
6 There -- not cars.

7 There are salesmen who sell underbody  
8 coatings and other accessories like that.  
9 There's lube technicians. There's body people  
10 who work on painting, on upholstery, on body  
11 repairs. There's car jockeys. There's  
12 dispatchers who allocate the work. So there's  
13 many different people who work at a car dealer.

14 Congress picked out only three and  
15 they picked out those three for a particular  
16 reason. And if you look at actually the things  
17 that we cite, all three of those share  
18 something in common, and service advisors not  
19 only don't share that but have a different  
20 quality that makes them much more likely to be  
21 in the statute.

22 JUSTICE BREYER: Well, if the  
23 mechanics are in there because they did call  
24 farmers at 2 in the morning, did the service  
25 advisor call the farmer too?

1 MR. FELDMAN: There's -- as far as I  
2 know in the history of the auto industry --

3 JUSTICE BREYER: No?

4 MR. FELDMAN: -- there's never been an  
5 example of a service advisor who worked off  
6 site and probably very rarely, if ever,  
7 irregular hours. Those were the keys to why  
8 Congress wanted partsmen and mechanics in  
9 there.

10 They're also clearly the most  
11 important reason why they wanted salesmen in  
12 there, because salesmen in those days and still  
13 today at luxury dealerships, I'm told, salesmen  
14 will come and bring the car to you to go take a  
15 test drive. And car salesmen --

16 JUSTICE GINSBURG: How about that  
17 Congress got it wrong in what they perceived  
18 the partsman job was? They were right about  
19 the partsmen who work on farm equipment, but  
20 they were wrong about the partsmen who work on  
21 automobiles, who works regular hours.

22 MR. FELDMAN: I don't think they were  
23 wrong. I think what they decided is they  
24 wanted to include partsmen and mechanics, who I  
25 think reasonably are both said to be servicing



1 cars, and they then decided to include the  
2 whole categories and not just limit it to -- to  
3 farm implements or a particular kind of  
4 mechanic or partsman, as long as they're  
5 servicing cars. That was the limitation.

6 JUSTICE KAGAN: But your definition of  
7 servicing, which I think is a very natural one,  
8 I mean, and not just, you know, natural, it's  
9 the dictionary definition of servicing, but it  
10 has to cope with this partsmen word.

11 How does -- how do partsmen fit within  
12 your definition of servicing?

13 MR. FELDMAN: Well, I do -- I think  
14 partsmen are reasonably said to be servicing  
15 cars. If the mechanic is -- needs a fan belt,  
16 is working on a car and walks over two steps or  
17 five steps or 10 steps to pick up a fan belt  
18 off the wall and bring it back to the car, I  
19 think the mechanic is that whole time repairing  
20 or maintaining the car.

21 And what the partsman is doing is  
22 taking over a function, one part of the  
23 function of what the mechanic does, and instead  
24 the partsman's doing it. And that's why it  
25 works very closely, as we talk about in the

1 brief, they work very closely with parts --  
2 with mechanics. They try to get the parts to  
3 them in the order in which they need them on  
4 complex repairs and so on.

5 And I think that it's very reasonable  
6 too. And -- and I guess also a car is nothing  
7 but the sum of its parts. And for all those  
8 reasons I think it's very reasonable to say  
9 that they are servicing cars.

10 CHIEF JUSTICE ROBERTS: Well, but  
11 diagnosis is part of the servicing as well, and  
12 the service advisors at least do that. I mean,  
13 the mechanic isn't going to know what -- he  
14 needs to know what the problem is. And the  
15 service advisor will spend a fair amount of  
16 time trying to get a description from the  
17 customer -- sometimes it's easy, you know, the  
18 -- the car won't start. Other times, it's --  
19 it's -- it's -- it's going to be harder, and  
20 they need to get a good description.

21 You know, is the -- is the -- the --  
22 the person who takes down your symptoms at the  
23 doctor's office before the doctor comes in, is  
24 -- is she or he part of the medical treatment?

25 MR. FELDMAN: I -- I think actually

1 the -- the relevant question is, is he or she  
2 providing the treatment? And I would say no.  
3 They're giving an initial guess.

4 CHIEF JUSTICE ROBERTS: No, no, the  
5 statute talks about being engaged in. So is  
6 that person engaged in the medical treatment?

7 MR. FELDMAN: I don't think he's  
8 engaged in treating. He -- he may be -- may be  
9 a part of the process of --

10 CHIEF JUSTICE ROBERTS: I guess maybe  
11 it's the --

12 JUSTICE KENNEDY: But the dictionary  
13 definition of engaged says to do or take part  
14 in something.

15 MR. FELDMAN: Right. And -- and, you  
16 know, there is, as far as "engaged in" goes,  
17 this Court has, I mean, I actually did a Lexis  
18 search, and this Court does -- has used the  
19 term 500 times. It's used about 2,000 times in  
20 the U.S. Code.

21 It's used in the FLSA. In actually  
22 one of the provisions, in 2 -- 213(d) in the  
23 same statute, it's engaged in the delivery of  
24 newspapers. It's an extremely common word.

25 And I can't find any instance in which

1 any court has ever construed it to mean  
2 anything other than what Black's Law Dictionary  
3 says, which is to do something customarily or  
4 regularly or continually.

5           It doesn't mean doing something that's  
6 ancillary to that activity. So if you're --  
7 203(d) talks about engaged in the delivery of  
8 newspaper, and there's an exemption for people  
9 like that.

10           If you're calling somebody up on the  
11 phone and saying: Would you like your home  
12 delivery of your newspaper, I don't think that  
13 person is covered under that provision. And if  
14 this Court were to construe "engaged in" to be  
15 a term of breadth like that in this case, I  
16 think it would actually upset a lot of settled  
17 expectations across broad areas of the law.

18           When Congress wants to include --  
19 wants to broaden out a term, it uses terms like  
20 necessary and -- consequent and necessary to,  
21 which -- I'm sorry, necessary and incidental  
22 to, which it uses in a couple of the FLSA  
23 provisions that we cite, or it uses terms like  
24 "the process of," which it uses regularly  
25 throughout the U.S. Code.

1           But I don't think there's any basis to  
2 take in this statute, which is very, actually,  
3 finely written, to take the word servicing or  
4 engaged in servicing and say: Well, no, no,  
5 they mean something, like, in the criminal law,  
6 you might say someone is an accessory before  
7 the fact if they helped the crime before it's  
8 committed or after the fact if they help it  
9 afterwards.

10           I don't think -- but -- but in the  
11 criminal law, actually, if you didn't have 18  
12 U.S.C. Section 2, which made those people  
13 liable as principals, they wouldn't be liable  
14 for the crime.

15           And I do think it's the same principle  
16 here. When they're talking about engaged in  
17 servicing, they're talking about the people who  
18 service, not the people who I would concede do  
19 things that are necessary and incidental to the  
20 servicing. There's many people who do that.

21           JUSTICE KAGAN: Mr. Feldman, when --  
22 when you talked about the purposes, you focused  
23 on the fact that service advisors work on-site  
24 and don't work irregular hours.

25           I believe that Mr. Clement's argument,

1 and he'll correct me if I'm wrong, focuses on  
2 the fact of commissions, that these people,  
3 like other kinds of salesmen and like  
4 mechanics, are often compensated through  
5 commission schemes.

6 What about that?

7 MR. FELDMAN: I -- I think that  
8 commissions are actually completely irrelevant  
9 to this provision. There's many other people  
10 at the car dealership, including some -- many  
11 of the ones who I mentioned who are paid on  
12 commissions, who are not exempt. There's many  
13 people at car dealerships and throughout the  
14 economy who are exempt and who are not paid on  
15 commissions.

16 In fact, if -- where Congress was  
17 interested in commissions as a basis for an  
18 exemption, they provided one in 207(i). If  
19 you're paid more than 50 percent on commissions  
20 and you make more than one and a half times the  
21 minimum wage, then you can get -- you can be  
22 exempt under that provision.

23 It is possible that at least going  
24 forward -- and I would correct my friend -- at  
25 the time of the complaint, one thing that was

1 true here that's alleged in the complaint is  
2 that the dealership was not, up until recently,  
3 it says, keeping track of the time and the  
4 hours spent.

5 So, actually, they would have had a  
6 hard time keeping track -- even though they're  
7 required by law to do that, they would have had  
8 a hard time keeping -- making out the 207(i)  
9 exemption. But -- but going forward, it may be  
10 in this case that these people are covered by  
11 207(i).

12 You know, they're -- as far as the  
13 reliance interest that my friend mentioned, I  
14 actually think the reliance argument cuts  
15 exactly the other way. In -- when this Court  
16 had the case before, they were -- the question  
17 that the Court said it was interest -- it was  
18 concerned with about reliance was whether the  
19 19 -- people had been relying on the 1978 DOL  
20 letter and whether the agency in 2011 was  
21 required to give some explanation of why it  
22 changed its mind.

23 That's actually -- so that question is  
24 no longer in the case. The regulation, the  
25 Court said, is not controlling here.

1           But what has happened is, in 2011, DOL  
2 did tell everybody that it thought service  
3 advisors are not exempt from the -- from the --  
4 are not exempt. And in 2015, the Ninth Circuit  
5 decided a case. In 2016, about two years ago,  
6 this Court remanded the case to the Ninth  
7 Circuit.

8           By that time and long before that,  
9 probably from 2000 -- in fact, I know from 2011  
10 on, dealerships were being informed that  
11 service advisors -- advisors might well be  
12 covered here and that there is -- they might --  
13 you might -- they might be entitled to  
14 overtime. And it was certain --

15           JUSTICE KENNEDY: Well, could you add  
16 to that, or correct me if I'm wrong, that in  
17 the two circuit cases that ruled against the  
18 FLSA, the government had taken the opposite  
19 position?

20           MR. FELDMAN: That's right. That's  
21 right. But I -- I think my point about  
22 reliance is if you actually -- there's a  
23 two-year statute of limitations here.  
24 Everybody has known since 2011, and certainly  
25 since two years ago when this Court decided the



1 case last time, that there -- that these people  
2 might be entitled to overtime.

3 There -- as far as I can tell, there's  
4 been two cases at most, and I'm not sure about  
5 both of them, one in the District of Arizona  
6 and one in the Western District -- I think it's  
7 the Western District of New York, that have  
8 been filed claiming that service advisors are  
9 entitled to overtime. That's it, two cases.

10 So I think that in the -- the logical  
11 inference to be drawn is that most  
12 dealerships -- some dealerships are probably  
13 paying overtime right now to service advisors.  
14 In fact, I know that some are. Some  
15 dealerships -- many, many dealerships, probably  
16 the vast majority of them, have made -- have  
17 arranged things so they come within the 207(i)  
18 exemption.

19 And the reliance now -- what really is  
20 -- what -- what this case easily could be about  
21 is whether dealerships can stop paying overtime  
22 to people whom they're currently paying and  
23 whether dealerships can change the terms of  
24 their arrangements with service advisors so  
25 that the people who have -- have been coming

1 under 207(i), they can -- they don't have to  
2 comply with the limitations of 207(i). They  
3 don't have to comply with the minimum -- one  
4 and a half times the minimum wage and so on.

5 JUSTICE GINSBURG: Mr. -- Mr. Feldman,  
6 I -- I don't understand from what you said  
7 whether you are disagreeing with me that there  
8 would be no retroactive liability because  
9 employers relied in good faith on what had been  
10 the agency's position.

11 MR. FELDMAN: The -- I -- I agree with  
12 you that would -- there could be good-faith  
13 reliance that -- in this case, I think there  
14 would be good-faith reliance up until 2011.  
15 Then the complaint here was filed in 2012. So  
16 we would -- could only go back as far as 2011.  
17 There would be good-faith reliance.

18 But the point is that isn't going to  
19 be relevant to future cases. There's only two  
20 cases, I think, as far as I'm aware. Maybe  
21 there's another one that I haven't been able to  
22 find, but I've tried to look for them.

23 There's only two cases currently  
24 pending, but I think really the Court should be  
25 very careful about giving a lot of weight to --

1 to claims of reliance where what well might be  
2 happening is people are paying overtime and  
3 bringing their service advisors in 207(i) and  
4 what they really want to do is stop paying the  
5 overtime and stop bringing their service  
6 advisors within 207(i).

7 And so I don't think the -- the  
8 reliance issue that my friend discussed, I just  
9 don't think that's a reason to decide the case  
10 that way.

11 JUSTICE KAGAN: Mr. Feldman, the  
12 Solicitor General is not here in a case in  
13 which one would expect the government to be  
14 here. Do you know whether there's any activity  
15 taking place in the Department of Labor with  
16 respect to this issue?

17 MR. FELDMAN: I don't know. I -- I  
18 just don't know about that.

19 Yeah, I would make one other point  
20 about the purpose -- the purposes of the  
21 statute. So one of them was, these three  
22 people and especially auto salesmen, which is  
23 where -- what Petitioner says the service  
24 advisors are, the three categories that  
25 Congress included are people who work irregular

1 hours and off-site where it's hard to keep  
2 track of people's hours.

3 Now, service advisors have a different  
4 -- another feature. First of all, they never  
5 work off-site. They rarely work irregular  
6 hours. But there's another feature of how they  
7 work that cuts in the opposite direction.

8 The complaint in this case alleges  
9 that service advisors -- the service advisors  
10 in this case work 55 hours a week. Now, what  
11 Congress wanted to do in the Fair Labor Act was  
12 to set minimum standards of working conditions.  
13 And at the very least, they did -- they thought  
14 that should be 40 hours a week and that should  
15 be basically what people are expected to work.

16 Now, mechanics and partsmen, as well  
17 as, you know, warranty salesmen, lube  
18 technicians, all the other people at the auto  
19 dealership work an occasional overtime hour,  
20 but these people, this is their standard week  
21 after week, regular hours, 55 hours.

22 Congress when it -- Congress, in the  
23 FLSA, thought that that was -- that was the  
24 kind of thing they didn't want to have happen  
25 and, particularly because there was a second

1 purpose of the maximum hours of the overtime  
2 requirement, which is they wanted the people  
3 who are -- instead of employing somebody for 55  
4 hours, they wanted to say: Well, go hire  
5 somebody else to fill in that extra time,  
6 because they wanted to expand employment  
7 opportunities at the same time as they were,  
8 you know, legislating in favor of --

9 JUSTICE KENNEDY: Well, but if -- if  
10 you have a service advisor in the morning and  
11 then a different one in the afternoon, that's a  
12 completely different -- changed dynamic from  
13 the same person saying we found a little  
14 problem and we went ahead and did X, Y, or  
15 whatever.

16 MR. FELDMAN: Well, I mean, I -- I  
17 just would say one is that does happen  
18 sometimes. Two is another way to deal with  
19 this is to have fewer days worked and you can  
20 have longer hours. There's many occupations  
21 that work that way. You can -- you can share  
22 the work around. You can give people time off  
23 in the middle of the day. Okay? This  
24 dealership doesn't do any of those things.

25 They -- it's a -- it's a 55-hour week.

1 And that's exactly the purpose of the F --  
2 these are people that come directly within the  
3 purposes of the FLSA. And it's no coincidence  
4 that Congress didn't include them in the  
5 statute when it included salesmen, partsmen,  
6 and mechanics.

7 Another -- I would say also that  
8 Petitioner's argument is primarily -- is that  
9 service advisors are salesmen. And, actually,  
10 on page 5 of the reply brief, Petitioner says  
11 they're salesmen because they are principally  
12 involved in selling. And that's what you would  
13 expect salesmen to do.

14 But that does create a logical problem  
15 for Petitioner because, if you're principally  
16 involved in -- you can't be principally  
17 involved or it's hard to be principally  
18 involved in two different things, especially  
19 two things as different as selling and  
20 servicing.

21 So, if they're principally involved in  
22 selling, which is what Petitioner says makes  
23 them a salesman, and I think what would make  
24 them a salesman if they were, then it's -- it's  
25 impossible to say that they're -- then it's

1 hard to turn around and say: No, no, they're  
2 principally engaged in servicing.

3 The -- the two categories are distinct  
4 in the statute. And as examples I gave are the  
5 house painter or the -- a -- a travel agent  
6 who's selling guided tours is -- you know, or a  
7 AAA person who's selling you roadside  
8 assistance. All those people are selling you  
9 things. They're not doing them because the  
10 idea of selling something is a fundamentally  
11 different concept than the idea of actually  
12 doing it. And that's a problem -- a problem  
13 that I don't think Petitioner can escape.

14 I mean, that is the reason why what  
15 Congress did is they -- they put service  
16 advisors with all the other people in the auto  
17 dealership who I mentioned who are not exempt  
18 and who get overtime.

19 I think even Petitioner doesn't  
20 actually believe at least in one respect that  
21 -- that service advisors are principally  
22 engaged in selling -- in servicing automobiles.  
23 There are people at the dealership who sell  
24 underbody coatings and assorted paint sealants,  
25 upholstery treatments, tire treatments. Those

1 people are definitely salesmen. That is their  
2 job, is to sell.

3 They -- those -- those things are all  
4 services that are provided to the car. And yet  
5 Petitioner has conceded from the beginning of  
6 this litigation that those people who do that  
7 kind of selling, that they are not covered by  
8 the statute.

9 And I think that just is a natural  
10 conclusion that Petitioner draws because I  
11 think that's the natural way to read this  
12 statute.

13 Petitioner -- my friend did refer to  
14 the -- said that the Department of Labor has  
15 taken the position that auto -- that auto body  
16 repair people are not covered by the -- the  
17 statute. I think that that is actually  
18 mistaken.

19 The only cite -- source for that is in  
20 a footnote in the reply brief. It's a 1968  
21 opinion letter by Department of Labor, and what  
22 Department of Labor said there -- first of all,  
23 the opinion letter stood for the proposition  
24 and addressed the question of whether auto  
25 painters are covered by the statute, are



1 exempt, and it concluded that they're not  
2 exempt.

3 But, secondly, it did then talk about  
4 a category it called body and fender mechanics.  
5 And it suggested that they are not -- that they  
6 are exempt under this statute.

7 Well, I just think it's worthwhile  
8 looking at what happened to that. In 1970,  
9 body and fender mechanics were included in the  
10 original version of the -- of the regulation as  
11 an example of the kind of people who are  
12 considered mechanics and could be exempt.

13 In 1973, three years later, I think it  
14 was the first revision of it, they kept the  
15 list of people who are mechanics the same and  
16 removed body and fender mechanics. So I think  
17 the only thing you can conclude is the  
18 Department of Labor has not concluded and there  
19 isn't a history of saying that even body and  
20 fender mechanics are not covered, but whether  
21 they're covered or not would be a different  
22 question, but at least auto body repairmen are  
23 not.

24 Congress picked three distinct  
25 professions who were well recognized at the

1 time of the statute and said, you know, we want  
2 those occupations, specific occupations to be  
3 exempt for the reasons that I said, that  
4 service advisors were a well-recognized  
5 occupation at that time.

6           They -- they were recognized in the  
7 Occupational Outlook Handbook. They had been  
8 recognized in NLRB decisions from the 1940s on,  
9 in industry publications. And there's a reason  
10 why they're a distinct occupation, because if  
11 you look at the jobs that they do, it's  
12 actually a completely different job than the  
13 job that's done by -- by auto salesmen, who are  
14 the people who Congress undoubtedly wanted to  
15 include.

16           The one other thing I'd like to say is  
17 about the distributive or reddendo canon. I  
18 mean, we don't -- we -- what that canon stands  
19 for is the proposition that when you have two  
20 lists like this that you have to make match up,  
21 as -- as dates -- as -- as in the Simms case,  
22 is actually a great example, where you have  
23 three in the first category and two in the  
24 second and you have to match them up, it is  
25 common, and there are or's, they're connected

1 by the word "or," it's common in the English  
2 language to say, well, we match up the ones  
3 that actually fit according to the context, but  
4 we don't have to struggle and strain to twist  
5 the ordinary meanings of words or something  
6 like that to try to barely find a way in which  
7 everything in the first list has to match with  
8 everything in the second.

9           And that is all that that canon means.  
10 It means that it's perfectly acceptable and was  
11 what Congress, I think, did, is to say salesmen  
12 match up with sells there, and are logically  
13 related, they're semantically related, that's  
14 what Congress intended to do, and it matches  
15 perfectly.

16           Partsmen and mechanics match up with  
17 servicing. Salesmen don't match up with  
18 servicing and, in fact, insofar as someone is a  
19 salesman, they're almost certainly not a  
20 service person.

21           If there are no further questions.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24           Five minutes, Mr. Clement.

25

1 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

2 ON BEHALF OF THE PETITIONER

3 MR. CLEMENT: Thank you, Mr. Chief  
4 Justice, and may it please the Court:

5 Just a few points in rebuttal. First  
6 of all, I'd like to start with the reliance  
7 issue. I don't think it is factually accurate  
8 at all to say that when the 2011 regulation  
9 came in, without any explanation that was  
10 ultimately deemed procedurally invalid by this  
11 Court, that dealerships just stopped what they  
12 were doing and changed 40 years of practices.

13 If that had happened, this suit would  
14 not have happened. I mean, the reality is that  
15 across the country, based on that unexplained  
16 regulation, dealerships continued their  
17 traditional practices. That's why the reliance  
18 interests are all on our side of this case.

19 Now, there are also reliance interests  
20 for the treatment of body repairmen who have  
21 from the very beginning been treated as exempt  
22 at dealerships.

23 Now, there is the letter that we cite  
24 that talks about how painters are not covered  
25 and body repairmen are covered. It also cites

1 legislative history -- I'll grant you the  
2 legislative history was more focused --

3 JUSTICE SOTOMAYOR: Mr. Clement, how  
4 -- Mr. Clement, your new definition, your more  
5 expansive definition, tell me how many more  
6 people that are involved in the service  
7 department will be covered.

8 Will it include the dispatchers who  
9 tell people -- who don't do anything but assign  
10 the work, or the lubesmen, the upholsterers,  
11 all those other people who right now for 40  
12 years, or more or less, have been paid a  
13 salary, are they now going to be subject to  
14 automobile dealerships saying: Given this new  
15 definition, we can forego paying them minimum  
16 wages?

17 MR. CLEMENT: No, Justice Sotomayor.  
18 We're here -- we're on the status quo team. We  
19 don't -- we're not trying to get some change --

20 JUSTICE SOTOMAYOR: Well, that's very  
21 nice, but tell me -- but your definition --

22 MR. CLEMENT: Sure, sure.

23 JUSTICE SOTOMAYOR: -- your definition  
24 might very well include them --

25 MR. CLEMENT: It might --

1 JUSTICE SOTOMAYOR: -- because you're  
2 basically saying anybody involved in servicing  
3 is covered.

4 MR. CLEMENT: No, that's where --  
5 that's where, with all due respect, you're  
6 wrong. We're -- we're giving you a definition  
7 of servicing, but we also say it works in the  
8 statute together with salesperson, partsman,  
9 and mechanic.

10 So, in order to be covered, you have  
11 to be both. You have to be one of those three  
12 categories of employee, and you have to be  
13 primarily engaged in servicing.

14 So nothing's going to change for the  
15 non-mechanics, the non-salespeople, the  
16 non-partsmen. Things are going to stay the  
17 same because we have -- we have a definition of  
18 servicing that has to include partsmen, that  
19 includes service advisors, and service advisors  
20 are included not because -- just because they  
21 are primarily engaged in servicing but because  
22 they are also salespeople.

23 So I just wanted to say that the  
24 legislative history is specific as to fender  
25 and bodymen. They -- they were -- they were

1 meant to be exempt mechanics. They're treated  
2 as exempt. I hope we don't have another change  
3 to deal with.

4 Under the status quo, body repairmen  
5 are exempt. Mechanics, traditional mechanics  
6 are exempt. Partsmen are exempt, and sales  
7 advisors are exempt, and there are real  
8 reliance interests on that.

9 As to the Labor Department's position,  
10 they're obviously not here. Footnote 9 of our  
11 reply brief points out that they have put an  
12 advisory out that they are not going to take  
13 any enforcement actions against sales advisors  
14 until this Court rules in this case, which I  
15 think just underscores that the reliance  
16 interest, the status quo, is in our favor.

17 There's no current regulatory effort  
18 to go after service advisors. And there really  
19 hasn't been one from the Labor Department  
20 itself since about 1978.

21 And, Justice Breyer, if you're looking  
22 for a tie-breaker with an agency somewhere, I  
23 think it's four decades of acquiescence.  
24 That's the last valid action from the Labor  
25 Department. The 2011 regulation was deemed

1 procedurally invalid.

2 So the last word for them is 1978  
3 opinion letter, 1987 enforcement manual.  
4 For -- for 40 years everybody has understood  
5 service advisors to be exempt, whether you  
6 think about that as the --

7 JUSTICE KENNEDY: Were the two  
8 circuits that ruled in favor of the  
9 employees -- was -- was that within the 40-year  
10 period? Did the agency take the position in --  
11 in those two cases that --

12 MR. CLEMENT: That, Justice Kennedy --

13 JUSTICE KENNEDY: -- they were not  
14 covered?

15 MR. CLEMENT: -- is really what starts  
16 the 40 years of reliance. So the first of  
17 those cases was a Fifth Circuit case called  
18 Deel Motors. That was an enforcement action  
19 brought by the Labor Department, but the Labor  
20 Department lost.

21 Shortly thereafter they also lost in  
22 the Sixth Circuit, and that's when they started  
23 acquiescing. The Fourth Circuit case comes  
24 along later, and that's a private party action.  
25 It's not an enforcement action.



1           So we do have, you know, roughly, at  
2           least since 1978, we've had acquiescence from  
3           the Labor Department, which gives rise to all  
4           of these reliance interests.

5           In terms of the purpose of the  
6           statute, I really thought it was interesting  
7           that my friend on the other side emphasized the  
8           fact that the service advisors work 55-hour  
9           weeks because Congress, when it dealt with  
10          people who by the nature of their job work long  
11          weeks, they had one of two reactions to that.

12          One of it, they said: Boy, that's  
13          awful, and we want to have more workers, so  
14          we're going to limit them to 40.

15          The other is they said: Oh, yeah,  
16          that's the way it is in that industry, and  
17          those people are underpaid, so we're going to  
18          give them an exemption. That's exactly what  
19          they did with service advisors. Thank you,  
20          Your Honor.

21          CHIEF JUSTICE ROBERTS: Thank you,  
22          counsel. The case is submitted.

23          (Whereupon, at 11:02 a.m., the case  
24          was submitted.)

25

## Official - Subject to Final Review

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